84-770

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SAVE MART OF MODESTO, INC.,
Petitioner,

VS.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 126,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a federal court have jurisdiction to decide an issue of representation within the exclusive purview of the National Labor Relations Board?

2. Does federal law turn on the forum in which a claim is asserted such that arbitration may be compelled though in the absence of an arbitration provision the court would lack subject matter jurisdiction to entertain the dispute?[1]

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[1]There are no interested parties other than those designated in the caption. Petitioner is a privately held corporation.

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PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Save Mart of Modesto, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on September 11, 1984.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is printed in the Appendix hereto and is not officially reported.

JURISDICTION

The Decision of the Court of Appeals for the Ninth Circuit was issued on September 11, 1984. No Petition for Rehearing having been filed, this Petition For Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant parts of Sections 157, 159 and 301 of the Labor-Management Relations Act of 1947, as amended,

(hereinafter "LMRA") are set forth in the Appendix hereto. No constitutional provisions are implicated.

STATEMENT OF THE CASE

Save Mart of Modesto, Inc. (hereinafter "Save Mart") operates a chain of retail supermarkets in the State of California. Until 1983, employees working in the meat departments of stores located in various California counties were represented for the purposes of collective bargaining by United Food and Commercial Workers Union Local 126 (hereinafter "Union").

In February, 1983, Save Mart opened a new retail store in Hanford, California. Two weeks before the store opened to the public, the Union demanded that Save Mart apply the existing collective bargaining agreement to the Hanford meat department employees. The Union did not claim to represent a majority of the employees working in the meat department nor did it claim that it had any objective evidence that the employees wished union representation.

Save Mart rejected the Union's demand. The Union then filed a grievance asserting that the company had violated the contract "by failing to apply the collective bargaining agreement to the employees in the Hanford store." When Save Mart refused to submit this grievance to arbitration (though it did agree to arbitrate other grievances), the Union filed a Petition to Compel Arbitration with the United States District Court for the Eastern District of California which subsequently ordered arbitration. The District Court's jurisdiction had been invoked under Section 301 of the LMRA.

REASONS FOR GRANTING THE WRIT

The extent to which the federal jurisdiction exists under Section 301 over representation questions within the purview of the National Labor Relations Board ("NLRB") has been subject to much dispute and conflicting Circuit Court interpretation. *See generally Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, ... U.S. ....., 53 L.W. 3263 (1984) (Justices White and O'Connor dissenting from denial of certiorari).[2] In compelling arbitration, the Ninth Circuit not only resurrects this inter-Circuit dispute but adds an additional twist by allowing federal law to vary depending on the forum in which the representational claim is asserted, in direct contravention of this Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). By doing so, the Ninth Circuit creates a new inter-Circuit dispute. *See Teamsters Local 807 v. Brink's, Inc.*, ... F.2d ....., 117 LRRM 2306 (2nd Cir. 1984).

Three Courts of Appeals have held that they lack jurisdiction under Section 301 to consider representational issues. *Local Union 204, Int'l. Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co.*, 668 F.2d 413 (8th Cir. 1982); *Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982); *cert. den.* 53 L.W. 3263 (1984); and *Teamsters Local 807 v. Brink's, Inc., supra.* In another context, the Eleventh Circuit Court of Appeals has declined to exercise juris-

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[2]As predicted by Justice White, the conflict continues to widen. As discussed *infra*, the Second Circuit Court of Appeals has added its voice to the dispute, *Teamsters Local No. 807 v. Brinks, Inc.*, ... F.2d ...., 117 LRRM 2306 (1984), while the Ninth Circuit continues to adhere to its announced position. *Carpenters Local Union No. 1478 v. Stevens*, ... F.2d ...., 117 LRRM 2023 (1984).

diction to avoid interfering "with the congressional distribution of authority between executive agencies and the judicial branch." *Computer Sciences Corp. v. NLRB,* 677 F.2d 804 (1982). In contrast, the Fifth Circuit Court of Appeals has held that Section 301 jurisdiction does exist over representational issues. *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,* 690 F.2d 489 (1982).

Consistent with its position, the Ninth Circuit has also held that, in the absence of an arbitration provision, it lacks jurisdiction to determine whether an existing collective bargaining agreement covers a new location. *Local 3-193 Int'l. Woodworkers of America v. Ketchikan Pulp Co.,* 611 F.2d 1295 (9th Cir. 1980). Nonetheless, the Court requires Save Mart to arbitrate whether its existing collective bargaining agreement should be applied to a new store. The Union is permitted to press its arbitral claim though the *identical* claim could not be pursued in court. Such a result is clearly contrary to this Court's holding in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra,* wherein the Court *refused to compel arbitration* since the remedy sought, application of the collective bargaining agreement to a successor employer, was contrary to developed labor law. The Court was unwilling to permit federal labor law to turn on the forum in which a particular claim was pressed.

Though the Ninth Circuit has puzzled over the dilemma of why an arbitrator should possess the derivative power under Section 301 to resolve a dispute beyond the subject matter jurisdiction of the court, it fails to provide a solution. *Local No. 3-193, Int'l. Woodworkers v. Ketchikan Pulp Co., supra,* at 1298-1299. Indeed, this anomaly recently

led the court to conclude that "[a] persuasive argument can be made that it is even less appropriate for arbitrators than for courts to decide representational issues within the Board's primary jurisdiction. See Comment, *Arbitration of Representational Issues: A Critique of Carey*, 1983 B.Y.U.L. Rev. 349." *Carpenters Local 1478 v. Stevens*, ... F.2d ....., 117 LRRM 2023, n. 11 (9th Cir. 1984).

In contrast, under analogous facts, the Second Circuit refused to compel arbitration concluding that the representational obligation sought to be imposed has its origins in Section 159 of the LMRA and cannot be said to be contractual in nature. *Teamsters Local 807 v. Brink's, Inc., supra.* Unlike the Ninth Circuit, the Second Circuit rejected the union's efforts to characterize the dispute as contractual merely because reference could be made to a collective bargaining agreement. *See also Local Union 204, Int'l. Brotherhood of Electrical Workers v. Iowa Electric Light & Power Co., supra,* at 420. ("To allow such a result [review of a representational matter] would render nugatory sections 8, 9, and 10 of the Act, 'for every dispute concerning the appropriate bargaining unit could be recast in terms of a breach of an "alleged" bargaining agreement.'")

The confusion exhibited by the Ninth Circuit and the conflict that presently exists between the various Courts of Appeals is a direct result of the basic inconsistency between *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964), and *South Prairie Construction Co. v. Local No. 627, Int'l. Union of Operating Engineers,* 425 U.S. 800 (1976) (*per curiam*). *See generally* Comment, *Arbitration of Representational Issues: A Critique of Carey, supra,* at pp. 354-356. Attempts to reconcile these two cases has led to greater confusion.

In *Carey,* the Court held that a question concerning representation, though subject to resolution by the NLRB, could be arbitrated. Since an arbitrator possesses no magical power but is merely an agreed-upon dispute resolution mechanism whose authority is derived from Section 301, the lower courts concluded that they, too, possess this authority. But, this Court undercut *Carey* when twelve years later it ruled in *South Prairie* that the appropriateness of a bargaining unit was a representational question reserved in the first instance to the NLRB. Since Congress had given the NLRB the authority to make the initial determination, the judiciary was precluded from invading the NLRB's province. This Court's failure to reference *Carey* in *South Prairie* led to the subsequent inter-Circuit disputes on (1) whether the courts retain any jurisdiction to consider representational issues and (2) whether these issues can properly be referred to arbitration.

Representational issues, in the context of a Section 301 action, inherently involve a determination of whether particular employees are covered by an existing collective bargaining agreement. Congress gave the power to determine such representational issues to the NLRB because the determination turns on *statutory* criteria within the expertise of the NLRB. *South Prairie Construction Co. v. Operating Engineers, supra,* at 803-804. The parties' contractual agreement, whether express or not, is of no relevance. "The determination of questions of representation, accretion, and appropriate unit do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria." *Marion Power Shovel Co., Inc.,* 230 NLRB 576, 577-578 (1977).

Direct actions under Section 301 for breach of contract or to compel arbitration are nothing more than efforts to circumvent the NLRB's exclusive authority to make a statutory determination. An arbitrator, or a court acting in the shoes of an arbitrator, is enforcing contractual rights and is not concerned with the statutory criteria developed and applied by the NLRB. One of the principal, if not the principal, cornerstones of national labor law is the protection embodied in Section 157 of the LMRA guaranteeing to employees the exercise of full freedom of association and the right to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment. In *South Prairie* this Court recognized that this protection could only be maintained if the NLRB's authority was not infringed.

Simply stated, *Carey* conflicts with the reasoning enunciated in *South Prairie* and has led to the confusion and conflicting decisions that presently exist among the Circuit Courts of Appeal. *See* Comment, *Arbitration of Representational Issues: A Critique of Carey, supra*; and Anderson, *Suits to Bind Non-Signatories To Collective Bargaining Agreements Under Section 301: The Emerging Federal Common Law*, 1983 B.Y.U.L.Rev. 241. Efforts by the lower courts to reconcile *Carey* and *South Prairie* have proven unsuccessful. Indeed, the tension has led to the strange result exhibited in the instant case wherein the Ninth Circuit compels arbitration on an issue which it acknowledges it lacks subject matter jurisdiction to entertain. The Court permits the Union to pursue its arbitral claim though the identical judicial claim would be barred. The direct consequence is to allow federal law to vary depending on the forum in which the claim is asserted—a variance that this

Court severely condemned in *Howard Johnson Co. v. Detroit Local Joint Executive Board, supra.* At least the Second Circuit avoids this intra-Circuit inconsistency by refusing to order arbitration. *Teamsters Local 807 v. Brink's, supra.*

The conflicting Circuit decisions and the intra-Circuit variance in the Ninth Circuit will not be resolved until this Court determines the jurisdictional scope of Section 301. Until then, the present conflict will widen, and federal law will turn on the forum in which a claim happens to be litigated.

CONCLUSION

There is wide disagreement on the question of whether Section 301 empowers the judiciary to consider questions of representation. Only this Court can resolve the divergent views expressed by the various Courts of Appeal. For the foregoing reasons, this Petition For Writ of Certiorari should be granted.

DATED: November 8, 1984.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 83-2319

D.C. No. CIV F-83-127-EDP
United Food and Commercial Workers Union,
Local No. 126,
Plaintiff/Appellee,

vs.

Save Mart of Modesto, Inc.,
Defendant/Appellant.
[Filed Sept. 11, 1984]
Appeal from the United States District Court
for the Eastern District of California
Edward Dean Price, District Judge, Presiding
MEMORANDUM*

Argued and Submitted May 16, 1984

Before: ANDERSON, SKOPIL and POOLE,
Circuit Judges.

Save Mart appeals the district court's order compelling arbitration. We affirm.

At issue is the parties' collective bargaining agreement requiring Save Mart to recognize the union as the exclusive bargaining agent for "all employees covered by this Agreement" within the union's jurisdiction. Despite its prior practice, Save Mart refused to extend the union contract

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*Per Ninth Circuit Rule 21, this disposition is not intended for publication and shall not be cited as precedent.

to a new store until the union demonstrated majority status. The union immediately filed a grievance, and when Save Mart resisted arbitration, the union sought to compel arbitration.

When faced with a petition to compel arbitration, a court must decide if the contract provides for arbitration of the particular dispute. *Alpha Beta Co. v. Retail Store Employees Union, Local 428,* 671 F.2d 1247, 1250 (9th Cir. 1982). The relevant provision here calls for arbitration of "[a]ny dispute that may arise as to the interpretation of this Agreement." There is a strong presumption in favor of arbitrability. *United Food and Commercial Workers Unions v. Alpha Beta Co.,* 736 F.2d 1371, 1374 (9th Cir. 1984). "An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960) (footnote omitted). In light of the strong presumption, we have no problem in agreeing with the district court that the dispute falls within the coverage of the parties' arbitration clause.

Save Mart correctly argues, however, that a court cannot compel arbitration if the contract clause on its face violates federal law or is contrary to federal labor policy. *United Food,* 736 F.2d at 1376. Save Mart contends that the union is attempting to arbitrate an accretion clause and thereby force union representation on the new store employees in violation of their self-determination rights under section 7 of the NLRA. *See generally Local No. 3-193 International Woodworkers of America v. Ketchikan Pulp Co.,* 611 F.2d 1295, 1301 (9th Cir. 1980).

We cannot say, however, that the clause is unlawful on its face. *See Haig Berberian, Inc. v. Cannery Warehousemen,* 535 F.2d 496, 499 (9th Cir. 1976). The arbitrator may determine that the clause is not illegal because it was intended either to be a waiver of Save Mart's right to demand an election, or because extending coverage of the contract will not violate the employee's section 7 rights. Moreover, a conflict between the arbitrator's decision and federal labor law "is necessarily speculative when the arbitrator has yet to rule." *United Food,* 736 F.2d at 1376 (quoting *Hospital & Institutional Workers Union Local 250 v. Marshal Hale Memorial Hospital,* 647 F.2d 38, 42 (9th Cir. 1981)). Any conflict can be later resolved in an action to enforce the award. The mere possibility of conflict cannot defeat arbitration. *United Food,* 736 F.2d at 1376.

Finally, we note that even if the dispute implicates representational rights of the employees, arbitration may not be foreclosed. *See Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 272 (1964); *United Food,* 736 F.2d at 1379, n.13. Resort to arbitration "may as a practical matter end the controversy or put into movement forces that will resolve it." *Carey,* 375 U.S. at 265. If ultimately the Board disagrees, its ruling would take precedence, *Carey, id.* at 272, and the court would refuse to enforce the award. *See e.g., Cannery Warehousemen, Food Processors, Drivers & Helpers for Teamsters Local Union #748 v. Haig Berberian, Inc.,* 623 F.2d 77, 82 (9th Cir. 1980).

This appeal is not frivolous. We decline to award sanctions. AFFIRMED.

APPENDIX B

In the United States District Court for the
Eastern District of California
United Food and Commercial Workers Union,
Local No. 126,
Petitioner.
v.
Save Mart of Modesto,
Respondent.
CV F 83-127-EDP

ORDER

[Filed Aug. 10, 1983]

This matter came on regularly for hearing before the Court on July 26, 1983, with the Honorable Edward Dean Price, United States District Judge presiding, Henry F. Telfeian of McLaughlin and Irvin appearing for Respondent Save Mart of Modesto, Inc., and Paul D. Supton of Van Bourg, Allen, Weinberg & Roger appearing for the Petitioner United Food and Commercial Workers Union, Local No. 126. The Court having heard the argument of counsel, considered the evidence presented, and due deliberation have been had,

IT IS HEREBY ORDERED that Save Mart of Modesto, Inc. submit and process all disputes concerning the Hanford store through the grievance and arbitration provision contained in the parties' collective bargaining agreement, up to and including arbitration of said dispute.

DATED: August 9, 1983.

EDWARD DEAN PRICE
Edward Dean Price
United States District Judge

Appendix C

United States Code, Title 29, Section 157

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

United States Code, Title 29, Section 159 (a), (b)

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

United States Code, Title 29, Section 301(a)

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees

in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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Respondent.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE ISSUE PRESENTED

May an issue be submitted to arbitration where the Labor Board has expressly declined to find that the Union's pursuit of the grievance is a violation of the NLRA and where the Board has deferred processing of the Union's charge over the same facts pending resolution of the dispute through arbitration?

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I

COUNTER STATEMENT OF THE ISSUE PRESENTED

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Union's pursuit of the grievance is a violation of the NLRA and where the Board has deferred processing of the Union's charge over the same facts pending resolution of the dispute through arbitration?

II

COUNTER STATEMENT OF THE CASE

Because Save Mart has deleted a number of critical facts, it is necessary to present a counter statement of the case.

UFCW Local 126 has had a collective bargaining relationship with Save Mart for at least 30 years. During that period whenever a store was acquired or opened, Save Mart transferred the majority of the meat department employees from other stores represented by Local 126, and the contract was automatically applied.

In February of 1983, Save Mart opened a new retail store in Hanford

and chose a different course of action. Employees were not transferred from the current bargaining unit, laid off employees were not recalled to work at the Hanford Store and the referral procedure contained in the collective bargaining agreement was ignored. Thereafter the employer chose to operate the store non-union and refused to apply the collective bargaining agreement to the meat department employees.

Local 126 filed a grievance asserting, inter alia, that the employer had a contractual obligation to permit employees to transfer to the Hanford Store if they chose (consistent with the employer's own policy); that the employer had an obligation to utilize laid off employees from the other stores in preference to hiring new employees and finally that if no one else was available, the employer had an obligation to give preference to

those individuals who had signed up on Local 126's referral list. Each of these complaints was grounded in specific contractual language. In addition, the Union claimed that the contract should be applied to the meat department employees in Hanford, particularly, if the employer had complied with its contractual obligations set out above.

In response to the Union's grievance, the employer filed a charge with Region 32 of the NLRB asserting that the Union's pursuit of the grievance was an unfair labor practice within the meaning of 29 U.S.C. Section 158(b)(1)(A), No. 32-CB-1400. Region 32 dismissed the charge, and Save Mart appealed to the Office of the General Counsel which sustained the Region's dismissal of the charge and stated:

> "Here, however, assuming the Union is successful in its

grievances, the new facility would constitute a lawful accretion to the existing unit. Retail Clerks, Local 870 (White Front Stores) 192 NLRB 240. Therefore, it was concluded that the Union's grievance and court suit would not pursuit of an unlawful objective, even assuming, arguendo, that the Hanford Store might constitute a separate appropriate unit." (Letter from Office of Appeals sustaining dismissal of charge, dated August 5, 1983).

Dissatisfied with this result, the employer filed a "RM" Petition as well as a "UC" Petition seeking either an election or determination that the Hanford Store was a separate appro-

priate unit, Nos. 32-RM-251 and 32-UC-105. Once again, the Regional Director dismissed those petitions and the dismissal was affirmed by way of an order from the Board dated March 9, 1984.

On the other hand, the Union filed an unfair labor practice charge asserting that the employer's failure to apply the agreement at the Hanford Store was a violation of 29 U.S.C. Section 1580(a)(5), No. 32-CA-5774. Region 32 deferred processing the charge under the practice anunciated in Dubo Manufacturing Corporation 142 NLRB 431, in a letter dated September 30, 1983 to the parties. The Region stated:

> "The investigation has disclosed that the matter encompassed by the instant charge, specifically, the allegations that the Employer has unilat-

> erally changed its past practice and the terms of the collective bargaining agreement by refusing to transfer employees of its newly opened facility in Hanford, California, is presently the subject of a grievance arbitration proceeding under the provisions of the collective bargaining agreement between the Employer and the Union."

Thus, notwithstanding the employer's various efforts, the Board took the consistent position that the Union could lawfully pursue this grievance and furthermore declined to process the Union's Charge until the grievance was resolved through the arbitration process.

The District Court thereafter compelled arbitration and the parties selected Harvey Letter as their arbi-

trator. Arbitrator Letter issued his decision on December 6, 1984 finding that the employer's failure to apply the transfer, layoff or hiring provisions of the contract was violation of the contract, and furthermore, finding that as a result the contract should be applied to the Hanford Store. The Union has now filed a petition to confirm that arbitration award in the District Court for the Northern District of California.

We now turn within this factual setting to the reasons why, in this posture, this case is not one to resolve the issue which Save Mart asserts needs consideration by this Court.

III

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO POSSIBILITY OF ANY CONFLICT WITH THE LABOR BOARD DECISION.

A. Since the arbitrator has now issued his decision and the parties are litigating the validity of that award in another action, this matter is now moot. The question of the arbitrator's jurisdiction can easily be resolved in the action to confirm the arbitrator's award.

B. As can be seen from our counter statement of the facts, the issue was not solely that of the application of the current collective bargaining agreement to the Hanford Store but rather <u>initially</u> the issues concerned the contractual obligation with respect to the staffing of the store. The question initially presented to the arbitrator was whether Save Mart had to transfer employees, utilize laid off employees and/or utilize the referral procedure in the contract for applicants. Those questions do not involve questions con-

cerning representation even as described by Save Mart in its petition to this Court. It was only after resolving these issues, could the question of the application of the agreement to the Hanford Store be considered.

C. When this Court held that arbitration could proceed notwithstanding the fact that the same issue could be resolved by the Board, it also recognized that a decision of the Labor Board would prevail over any contrary arbitrator's decision. Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964). That holding has been followed by the Courts of Appeal and indeed the Ninth Circuit has repeatedly recognized that where there is a contrary decision, arbitration may either not be compelled or the arbitrator's decision may not be confirmed. See Frederick Meiswinkel v Laborers Union Local 261,

744 F. 2d 1374 (9th Cir 1984) and Carpenters Local Union 1478 v Stevens, 743 F. 2d 1271 (9th Cir 1984). On the other hand, the Ninth Circuit has repeatedly required arbitration of disputes, even those disputes subject to resolution by the Board, so long as there is no inconsistent Board determination. See United Food & Commercial Workers Union v. Alpha Beta Co., 736 F.2d 1371 (9th Cir. 1984); Hospital and Insitutional Workers Union Local 250 v. Marshall Hale Memorial Hospital, 647 F.2d 38 (9th Cir. 1981) and Haig Berberian, Inc. v. Cannery Warehousemen, 535 F.2d 496 (9th Cir. 1976). As we have shown above the Board has expressly sanctioned the arbitration process and declined to find that the Union's pursuit of this grievance to be violative of the Act. Indeed, the employer as of this date has not sought any further

review from the Board that the confirmation of the arbitration award would be unlawful.

Thus, this case falls squarely within the confines of those Ninth Circuit cases which have held that arbitration may precede so long as there in no inconsistent Iabor Board determination.

Save Mart is however correct that the Ninth Circuit has taken a more restrictive view when a party asks that the Court determine an issue which may ultimately affect the issue of representation of certain employees. Local 3-193 International Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295 (9th Cir. 1980) and Brotherhood of Teamsters Local No. 70 v. California Consolidators, Inc., 693 F.2d 81 (9th Cir. 1982), cert den., _____ U.S. ____, and Petition for Rehearing denied ____ U.S. ____ (1984). We

agree to a small degree with Save Mart's position that there is some facial inconsistency in permitting an arbitrator to make those determinations which a court may not make. Yet Save Mart has little standing to make such a complaint since the Ninth Circuit's order requiring arbitration is only consistent with its prior decisions requiring arbitration of such disputes absent the contrary board determination. Moreover, as we have shown above the issue submitted to the arbitrator was not one which can be strictly called representation because it involved various other contractual rights concerning transfers, seniority as well as the hiring procedure in the contract.

Were this strictly a case like California Consolidators supra where the District Court had initially decided the applicability of the contr-

act to the Hanford Store, we would have been forced to agree with Save Mart's position.1/ Moreover, it is not strictly such a case because of the existence of the other issues as noted which could only be resolved through arbitration.

D. It is apparent from our counter statement of the facts, that in light of the posture that the Labor Board has asserted, this case does not present the issue as posed by Save Mart. In our view, it is impossible for the Employer to assert that there is some conflict with the exclusive

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1/ Counsel of record in this case was also counsel in California Consolidators and urged this Court to grant that petition. This is however a different case for we are dealing with an arbitrator's award under circumstances where the Board has expressly encouraged the arbitration process.

jurisdiction of the Labor Board, when the Labor Board itself has sanctioned the arbitration process. In any case, in light of the arbitrator's recent decision and the pendency of litigation to confirm that award, it would not serve any judicial purpose to consider the asserted conflict between an arbitrator's decision to rule on the issues presented as opposed to whether a district court could rule on those same issues if presented initially.

IV

CONCLUSION

For the reasons suggested above, the Petition for Writ of Certiorari should be denied.

DATED: February 15, 1985

Respectfully submitted,

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(3)

No. 84-770

In The
Supreme Court of the United States
October Term, 1984

SAVE MART OF MODESTO, INC.,
Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 126,
Respondent.

PETITIONER'S REPLY MEMORANDUM

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In opposition to the Petition for Writ of Certiorari, Respondent United Food and Commercial Workers Union, Local 126, AFL-CIO (hereinafter "Local 126" or "Union") has filed a Memorandum suggesting that the case is moot, there is no potential conflict with the National Labor Relations Act, the arbitrator was not empowered to determine a representational issue, and accordingly, certiorari should not be granted. For the reasons set forth below, these suggestions are incorrect and should be rejected.

I.

The Status Of The Arbitration Proceeding Is Irrelevant.

The issue presented to this Court is whether the District Court had jurisdiction under Section 301 to issue an order compelling aribtration and not whether the decision rendered by the arbitrator is valid. The arbitration award is of no value if arbitration was improperly ordered in the first instance. *Haig Berberian, Inc. v. Cannery Warehousemen,* 535 F.2d 496 n. 1 (9th Cir. 1976). As held by the Sixth Circuit in *American Bell, Inc. v. Telephone Workers,* 736 F.2d 879, 116 LRRM 2673 (1984):

> "The Union argues that the issue in this appeal is moot because (1) the arbitrator has already held hearings on the disputed question of ABI's obligation under the collective bargaining agreement, and (2) ABI is admittedly bound by the bargaining agreement, whatever this court may decide, with respect to several thousand former Bell employees transferred to ABI in January of this year. We agree with ABI that the issue in this appeal is not moot. ABI has presented this court with the question whether it is bound by the bargaining agreement on the

> basis of Bell's transfer of assets, and whether it must therefore arbitrate disputes about its employment practices. This question is antecedent to any issue that the arbitrator may decide, and in fact will determine whether the arbitrator has jurisdiction. *The status of the arbitration proceedings is therefore irrevelant.*" (Emphasis added.) 116 LRRM at 2676-2677.

The Union's argument that this issue may now be litigated in a related proceeding to confirm the arbitration award[1] is simply incorrect. Having previously challenged arbitrability, Save Mart may have no standing to raise the objection in a subsequent proceeding. *George Day Construction Co. v. Carpenters Local 354*, 722 F.2d 1471 (9th Cir. 1984). The law of the case has been established.[2]

II.

The Union's Assertion Of Mootness Is Disingenuous And The Legal Question Is Subject To Repetitive Litigation.

The Union fails to inform the Court that presently pending between the parties are at least five other grievances involving additional stores and raising the identical issue presented by this Petition. The "dispute" is not over merely because this particular arbitration proceeding

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[1] On January 15, 1985, the Union filed with the United States District Court for the Northern District of California a petition to confirm the arbitration award rendered. The case has been assigned case no. C-85-0443 MHP.

[2] Nor do we understand the Union's contention to be an offer to waive any objection it may have to such a defense under *George Day Construction Co. v. Carpenters Local 354, supra.*

has been completed. *See Abood v. Detroit Board of Education,* 431 U.S. 209 (1977).

Moreover, Save Mart sought a stay of the Order Compelling Arbitration from both the District Court and the Court of Appeals. Both courts denied that request presumably because by bringing "the therapy of arbitration . . . to bear in a complicated and troubled area" the entire dispute might have been resolved. *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261 (1964). Indeed, the Union's prior suggestion of mootness to the Ninth Circuit Court of Appeals was rejected.

Arbitration, by its very nature, is an expeditious process which will always terminate before judicial proceedings can be completed. If issues about the underlying validity of the process cannot be raised merely because the arbitration proceeding itself has been completed, those issues will evade effective judicial review. It is well-established that an action is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 515 (1911); *see also Weinstein v. Bradford,* 423 U.S. 147, 149 (1975).

The courts have long recognized that the inability to undo past acts does not moot a controversy where the past acts have present or future consequences that can be reached by a judgment. *See Jones v. Snead,* 431 F.2d 1115 (8th Cir. 1970). A decision by this Court holding that Section 301 does not grant jurisdiction over representation issues would effectively nullify any arbitration award issued in this case, thus making this a live controversy subject to this Court's review. *Haig Berberian, Inc. v. Cannery Warehousemen, supra,* at n. 1.

III.

The Proceedings Before The National Labor Relations Board Are Irrelevant.

This Petition raises the important question of whether a court may permit an arbitrator to make bargaining unit and representation determinations which a court itself may not make. Local 126 seeks to ignore this issue and instead focuses on whether or not the National Labor Relations Board (NLRB) has made a final determination which, in turn, precludes the possibility of conflicting decisions. Despite Local 126's protestations to the contrary, many of the issues underlying this case are not now, and have never been before the NRLB. To the extent there has been some overlap, the NLRB has not issued a final determination.

In its Counterstatement of the Case, Local 126 repeatedly asserts that the NLRB has taken various actions. *Passim.* Local 126 failed to differentiate between decisions of the NLRB and decisions of the NLRB's General Counsel. While the former are binding law entitled to collateral estoppel or res judicata effect, the latter have no value whatsoever. *Courier-Citizen Co. v. Electrotypers Local 11,* 702 F.2d 273, n. 6 (1st Cir. 1983); *Edna Pagel, Inc. v. Teamsters Local 595,* 667 F.2d 1275 (9th Cir. 1982); and *Paramount Transportation System v. Teamster Local 150,* 436 F.2d 1064 (9th Cir. 1971).

As stated by Local 126, the unfair labor practice charge filed by Save Mart was dismissed by the General Counsel. Accordingly, that dismissal is of no moment. Additionally, the unfair labor practice charge filed by Local 126 alleging only that Petitioner improperly failed

to transfer employees to the newly opened Hanford store has been deferred to the pending arbitration proceedings. This preliminary deferral decision was made pursuant to the NLRB's longstanding policy, as set forth in *Dubo Manufacturing Corp.*, 142 NLRB 431 (1963), of deferring to court-ordered arbitration. The "RM" representation petition filed by Save Mart to allow its employees an opportunity to exercise their Section 7 rights was dismissed solely because Local 126 did not at that time claim to represent the employees in the Hanford store. Finally, the "UC" petition, which would have allowed the Board an opportunity to determine the bargaining unit and representation issues, was dismissed, *without prejudice*, as being premature. Thus, the NLRB has not made a determination upon the question of the appropriate bargaining unit or the representation rights of Local 126.

As can be seen from the Union's Counterstatement of the Case and the discussion above, the NLRB's Regional Office relied upon the District Court's order to arbitrate, pursuant to the Board's *Dubo Manufacturing Corp.* doctrine, in issuing its deferral letter.[3] Therefore, the NLRB

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[3] Local 126's claim that it filed an unfair labor practice charge asserting that the employers failed to apply the Agreement at the Hanford store is a misstatement of the facts. (Memorandum, p. 6.) Local 126's allegations were as follows: "Within the last six months preceding the filing of this charge, the above-named employer has unilaterally repudiated past practice and the terms of the collective bargaining agreement by refusing to transfer employees to the newly opened Hanford store. In addition, the employer has discriminated against employees on account of their Union activities and/or membership." (Basis of the charge as filed by Local 126 in NLRB Case No. 32-CA-5774, dated August 8, 1983.)

has not focused upon the bargaining unit or representation issues raised by the instant Petition. Neither has the NLRB had an opportunity to determine that a Regional Office perfunctory deferral decision, issued pursuant to *Dubo Manufacturing Corp., supra,* is consistent with this Court's determination in *South Prairie Construction Co. v. Local No. 267, Int'l. Union of Operating Engineers,* 425 U.S. 800 (1976) (*per curiam*), that the protections embodied in Section 157 of the Labor-Management Relations Act would be maintained by deferring bargaining unit and representation issues to private arbitration.

Of equal significance is that but for the District Court's order of arbitration, the NLRB would have exercised its primary jurisdiction to determine the representation issues involved herein. There can be no serious dispute that the unit clarification ("UC") petition would have been processed and the bargaining unit issue resolved had not the District Court issued the order to arbitrate. Finally, absent such an order to arbitrate, the Board would have had an opportunity to determine whether or not Local 126 had sustained its burden of affirmatively demonstrating that it represented a majority of those employees. For these reasons and each of them, Local 126's suggestion that the NLRB has affirmatively deferred its representational jurisdiction to private arbitration should be rejected.

In a related yet equally unavailing argument, Local 126 seeks to distinguish this case on the ground that there exists no inconsistent board determination, relying upon *United Food & Commercial Workers Union v. Alpha Beta,* 736 F.2d 1371 (9th Cir. 1984); *Hospital & Institutional Workers Union Local 250 v. Marshall Hale Memorial Hos-*

pital, 647 F. 2d 38 (9th Cir. 1981); and *Haig Berberian, Inc. v. Cannery Warehousemen, supra.* Local 126's reliance upon *Alpha Beta* and *Marshall Hale* is misplaced for the simple reason that neither of those cases raise representation issues. *Haig Berberian* is of no value for the reason that it was decided prior to *South Prairie* and the Ninth Circuit's later decision in *Local 3-193 v. Ketchikan Pulp Co.,* 611 F.2d 1295 (9th Cir. 1980).

Finally, Local 126 seems to suggest that while it would be inappropriate for a court to determine an issue which may ultimately resolve the representation rights of certain employees, it is appropriate for a court, acting under Section 301 jurisdiction, to direct that an arbitrator do the same thing. Recognizing that such a contention is inconsistent with this Court's decision in *Howard Johnson Co. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), Local 126 asserts that absent a "contrary Board determination" the order to arbitrate was proper. Local 126 does not rely upon any representation case authority for such a proposition, and none currently exists. Indeed, counsel for Local 126 concedes that if the District Court had determined the representation issue, the Union would not have opposed this Petition. Yet nowhere in its Memorandum does Local 126 explain why an arbitrator should possess the derivative power under Section 301 to resolve a dispute beyond the subject matter jurisdiction of a court. Moreover, Local 126 does not dispute that there is an inter-Circuit dispute upon the extent to which federal jurisdiction exists under Section 301 over representation questions within the purview of the NLRB. Only this Court can provide the solution to the problem raised by the in-

stant Petition, and a resolution of the divergent views expressed by the various Courts of Appeal.

IV.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the present controversy is not moot, and that the Petition for Writ of Certiorari should be granted to review the important federal questions raised by the Ninth Circuit Court of Appeals' Decision.

DATED: February 20, 1985.

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